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May 17, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal  
Date of Filing: October 20, 2004  
Case No.: TIA-0275

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance with filing for state workers' compensation benefits for the Worker. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.<sup>1</sup> Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.<sup>2</sup> Subpart E provides that all Subpart D claims will be considered as Subpart E claims.<sup>3</sup> OHA continues to process appeals until the DOL commences Subpart E administration.

### *B. Procedural Background*

The Applicant was employed as a mechanical engineer at the DOE's Pinellas Plant (plant) for approximately 36 years, from 1956 to 1992.

The Applicant filed a Subpart D application with the OWA, requesting physician panel review of several illnesses: melanoma, colon cancer with metastasis, squamous cell carcinoma, prostate cancer, and basal cell carcinoma. The Applicant claimed that the Worker's illnesses were the result of being exposed to radiation and toxic substances during his work at the plant. The Applicant also filed a Subpart B claim at the DOL. The DOL referred the application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant elected to send her Subpart D application to the Physician Panel without waiting for

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<sup>1</sup> Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

<sup>2</sup> See *id.* § 3675(a).

<sup>3</sup> See *id.* § 3681(g)

the results of the dose reconstruction.<sup>4</sup> Accordingly, the OWA sent the case to the Panel without a dose reconstruction.

The Physician Panel rendered a negative determination with regard to the claimed illnesses. The Panel agreed that the Worker had each of the claimed illnesses, but concluded that the illnesses were not likely related to exposure to toxic substances at the DOE site.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In her appeal, the Applicant states that "NIOSH has not finished its dose reconstruction, so it is unfair to say that [the Worker] was not exposed to toxic chemicals."<sup>5</sup>

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's argument that the Panel did not review the NIOSH dose reconstruction does not demonstrate Panel error. The Applicant elected to submit the claim to the Panel before the NIOSH dose reconstruction was completed. If the Applicant believes that the NIOSH dose reconstruction supports her application, she should raise the matter with the DOL.

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

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<sup>4</sup> Record at 25 (Case View History, entry for 1/16/04).

<sup>5</sup> Applicant's Appeal Letter at 1.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0275 be, and hereby is, denied.
- (2) The denial pertains only to this appeal and not to the DOL's review of these claims under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: May 17, 2005